every acre of holding. But if he replaces on half his holding the number of plants allowed for the whole holding and then sells the other part to some other holder who may exercise the same power of replacing, the policy of the Enactment may well be defeated.

What I have envisaged may possibly also be done under subsection (ii). The owner may replant during the whole period in which the Enactment is in force an aggregate of 20%. Having replanted his 20% of the holding which he had, he then sells all that he had not replanted and the new owner of this part is entitled to replant up to 20% of it in the aggregate: and so on. It therefore looks as though by a skilful use of the conveyancer's art almost the whole of what was a holding on 1st June 1934 could be replanted if the period of restriction is substantially extended.

I mention this point because if the hole which I suspect exists in the Enactment the Legislature may possibly see fit to fill it.

PEDLOW, J.—I have had the advantage of reading in advance the judgments of the learned Chief Justice and of Mr. Justice Horne, with whom I sat on this appeal, and I respectfully agree with them that the appeal should be dismissed. I do so because I am of opinion that the language of the section—section 23 of the Rubber Regulation Enactment—is so vague in its use of the words "on any acre" that it would be unwise to convict in this case unless the total number of trees replaced exceeded an average of 30 trees to the acre over the whole holding, which is not so.

I cannot, however, subscribe to the opinion, advanced both by the prosecution and the defence, that either party can select an acre in any arbitrary manner it chooses. It is understood that in practice 120 to 150 trees are planted on an acre of ground. The Legislature had in mind, in my opinion, the replacing of one tree in roughly every 4 or 5 throughout the entire holding, which meant that there would not then be more than 30 new trees on any square acre wherever selected, but it did not distinctly say so and in case of doubt it is a well-accepted principle of criminal law that the benefit of the doubt must be given to the accused.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

MILLS J.

October 27, 1938.

AHNA LANA VELATHAN.....Appellant (Plaintiff)

vs.

VINA CHINNIAH and S. SITHAMBARAM.....Defendant-Respondent

[BATU PAHAT CIVIL APPEAL No. 2 of 1937]

Practice—F.M.S. Civil Procedure Code, Sections 343 and 568—Judgment debtor summons—Whether process constitutes execution.

On appeal to the Court of the Judge the respondent, a third party, had been ordered to pay to the appellant a sum of $159/25. Subsequently an Order was made by the Assistant Registrar for payment of this sum by monthly instalments of $6/-. On the issue of a judgment debtor summons in the Court of the Judge objection was raised on the ground that the procedure by way of judgment debtor summons is execution and that application for execution should have been made to the Court of the Magistrate.

Held that the procedure by way of judgment debtor summons under Section 343 of the F.M.S. Civil Procedure Code is not execution within the meaning of Section 568.

JUDGMENT DEBTOR SUMMONS.

Preliminary Objection.

The facts and arguments appear from the judgment.

S. K. Das for Appellant.

McIntyre for third party. (Respondent)

MILLS, J.—On the 11th December, 1937, S. Sithambaram was ordered by the Assistant Registrar of the Supreme Court at Batu Pahat to pay by instalments of $6 a month a sum of $159.25 which the Judge, on appeal from the Magistrate, ordered S. Sithambaram to pay to the appellant. S. Sithambaram having defaulted in the payment of the second and subsequent instalments, the appellant procured the issue of a notice calling upon S. Sithambaram to show cause why he should not be committed to the civil prison. When S. Sithambaram appeared to show cause on the 8th October, 1938, Counsel took the preliminary objection that the order of the Assistant Registrar was a nullity, since procedure by way of judgment debtor summons is execution and by Section 568 of the Civil Procedure Code application must be made to the Court of the Magistrate.

The question in issue is whether the procedure by way of judgment debtor summons constitutes execution within the meaning of Section 568.

Both parties based their arguments on authority and reason. The authority for the conclusion that the procedure constitutes execution, is as follows.

In re Watson, (1893) 1 Q.B. p. 20.

The Master of the Rolls and two Lords Justices held that the proceduce under the Debtors Act, 1869, is not execution.

It is as clear as well can be that the power of committing a debtor, or of ordering him to pay by instalments, is not "execution" (p. 24).

Montgomery & Co v. *De Bulmes*, (1898) 2 Q.B. p. 420.

The Court of Appeal (2 judges) impliedly stated that the procedure is not execution: "the plaintiffs did not see their way to obtaining execution and they thought that this (putting in motion Section 5 of the Debtors Act, 1869) was the best way of getting their money" (p. 423).

The authority for the conclusion that the procedure constitutes execution, is as follows.

Bundy v. *Motor Cab Owner Drivers' Association and others*, 143 L.T. p. 334. (1930).

A Divisional Court of two judges held that the procedure is execution.

> "The section empowers the Court to direct a judgment debtor to pay by instalments. It is plain that this procedure is in truth a form of execution introduced by successive statutes in connection with the abolition in all ordinary cases of the old execution by caveat. It is a mode of enforcing the judgment:" (p. 336).

T. Thamotharam Pillai v. *S. Velu Pillai*, (1933—1934) F.M.S.L.R. p. 383.

Howes, J. states "In this judgment-debtor summons the administrator of the deceased plaintiff seeks execution...." (p. 383).

Ahna Moona Muthuraman Chettiar v. *K. N. Nair and ors.*, (1938) 7 M.L.J. p. 177.

Horne, J. in considering instalment orders under the Debtors Ordinance and under Order 40 rule 30 of the Civil Procedure Rules uses the expression "other forms of execution:" so he regards the procedure by way of judgment-debtor summons as a form of execution. (In addition, I was referred to the case of *G. Stephen* v. *M. Vallipuram*, (1931—1932) F.M.S.L.R. p. 49: but Burton J. does not describe the procedure in question as a method of execution).

My comments on the above cases are as follows:—

(a) it is difficult and dangerous to form conclusions regarding foreign law unless the whole of the relevant law is explained by an expert: it may be that the procedure, though not execution in its nature, may be deemed execution in England by virtue of the County Court Rules:
but if there is an irreconcileable conflict between the case of Bundy on the one and and the cases of Watson and of Montgomery on the other, I consider that the authority of the two latter cases is the more weighty:

(b) in the two local cases, the question whether the procedure was or was not execution does not appear to have been in issue or to have been argued.

(c) in the Colony, while procedure by obtaining a judgment-debtor summons under Order 40 rule 30 has been held to be execution, it would appear that procedure by obtaining a judgment-debtor summons under the Debtors Ordinance is not execution, since the procedure is contrasted with execution.

On the authorities, my decision is that the procedure by way of judgment-debtor summons is not in its nature execution. I may add that this procedure is not discussed under the title "Execution" in *Halsbury's* Laws of England (second edition). But that does not conclude the matter, because it may be the intention of our legislature to regard it as execution.

I now consider the appeal to reason.

On the one hand it is contended that the procedure is not to be regarded as execution for the following reasons:—

1. Since under Section 343 of the Code the summons may be taken out without application to the Court, the procedure cannot be execution since an application for execution must be made to the Court in writing under Section 253.
2. The procedure is not mentioned among the modes of execution specified in Sections 273-282.
3. The use of the expression "whether execution has issued or not" in Section 342 necessarily implies that the procedure is not execution.
4. The fact that by Section 346 imprisonment does not deprive any person of any right to take out execution against property necessarily implies that the procedure is not execution.
5. The procedure is not a method of execution because the decree operates as an order to pay money at once, and an order to pay money by instalments cannot be a method of enforcing payment at once.

These arguments are attacked on the following grounds:

a. The words "without any application to the Court" in Section 343 are not intended to denote that the procedure is not execution, but operate as an exception to the usual rule that application must be made to the Court.

b. The words "whether execution has issued or not" in Section 342 are not intended to denote that the procedure is not execution, but allow the judgment-creditor to obtain a warrant although he has issued a summons.

On the other hand it is contended that the procedure is to be regarded as execution for the following reasons:—

I. The procedure is prescribed in a chapter entitled "Execution of Decrees."

II. The procedure forms part of the proceedings available for the execution of decrees.

III. The procedure is a method of execution because it is a method of enforcing the decree to pay money.

IV. The procedure must be execution and therefore available only in the Court of the Magistrate, because the Legislature cannot have intended that payment should be made to the Court of the Magistrate under Section 240 (a) or that the judgment-creditor should certify to the Court of the Magistrate under Section 241 (i), unless the instalments had been ordered by that Court.

My opinions on the above arguments are as follows:—

A. As to 5 and III: I consider that the procedure is not in itself a method of execution because the decree operates as an order to pay money at once, and an order to pay by instalments is not a method of enforcing an order to pay at once but is a variation of the decree.

B. As to 2 and I: I consider that although the chapter is headed "Execution of Decrees," this merely indicates the general nature of the matters provided for in the chapter and cannot be taken to denote that every proceeding mentioned in the chapter is a mode of execution (for instance Section 240 (b) is clearly not a mode of execution); on the other hand I consider that very great weight must be attached to the fact that the procedure is not referred to under the sub-heading "Mode of execution."

C. As to 3 and b: I do not agree that the words 'whether execution has issued or not' can include the procedure by way of summons under Section 343, because if that procedure is execution, then the procedure under Section 342 must also be execution, and the words would be rendered meaningless: I consider that the words 'whether execution has issued or not' refer to a mode of execution specified in Sections 273 to 282 and do not refer to the procedure referred to in Section 343.

D. As to 1 and a: there is some substance in both these arguments, and though I think that 1 is correct and a incorrect, I consider it would be safer not to draw any conclusion from the use of these words.

E. As to 4: I do not consider there is any merit in this: Section 346 preserves the right to execute against property, and procedure under Section 342 may still be execution without being execution against property.

F. As to II: I cannot attach any importance to this: it seems to me to beg the question because I am at present seeking to ascertain whether the procedure under Section 342 is or is not execution under Section 568.

G. As to IV: I do not consider there is any substance in this: if the procedure is not execution, the Magistrate has no authority to order instalments under Section 568, but nevertheless Sections 240 and 241 must be complied with.

My conclusion on the above authorities and arguments is that the procedure by way of judgment-debtor summons under Section 343 is not execution within the meaning of Section 568.

Certain other arguments were addressed to me:

I could not accede to them, but it is desirable that I should set them down and state my reasons for rejecting them.

First: I was asked to construe Section 568 in the light of Order 1 rule 40 and of Order 3 rule 69 of the Rules of the Supreme Court: I cannot do that because they are not deemed to be part of the same Enactment and are made by a different legislative body.

Secondly, I was asked to say that "Court" in Section 343 means the executing Court, whether or not the procedure of that Section amounts to execution under Section 568: I cannot do that: in my opinion Section 568, when properly construed, denominates the Court referred to in Section 343.

Thirdly: it was argued that under Order 3 rule 69 the Assistant Registrar has power to order the recovery of costs by execution and not otherwise, and that if the procedure by judgment-

debtor summons is not execution, then the order of the Assistant Registrar is a nullity:

I cannot accept this argument: whatever may be the exact purport of Order 3 rule 69, I hold that it does not prohibit the judgment-creditor from taking out a judgment-debtor summons under Section 342 after the expiration of 48 hours. On the present issue, I hold that the power to order the payment of instalments was in this case reserved to the Court which passed the decree in the appeal, that is, to the Supreme Court.

I hold that the Assistant Registrar acted *intra vires* in making the order, and I reject the preliminary objection.

The costs of hearing the preliminary objection must be borne by S. Sithambaram.

I direct the Assistant Registrar to restore the matter to the list for further consideration.

Order accordingly.

[APPELLATE CIVIL JURISDICTION]

MILLS J.

November 2, 1938.

O.R.M.M.S.M. LETCHUMANAN CHETTIAR .....Plaintiff-Appellant

vs.

1. LIM BOON SWEE and

2. YEOH GEE LEONG (f).....Defendants (Respondents.)

[BATU PAHAT CIVIL SUIT No. 21 of 1930]

Practice—Execution of decree—Surat Sementara—Whether rights of occupant attachable —F.M.S. Civil Procedure Code, Sections 283 (i) and 294.

An application by the Judgment-Creditor for attachment and sale of the debtor's right of occupancy and interest in certain land held under Surat Sementara was refused by the Assistant Registrar on the ground that such right arises *ex contractu* and is therefore not attachable under Section 283(i) of the F.M.S. Civil Procedure Code. On appeal to the Judge, *held*, the approved occupant under a Surat Sementara has no rights in *rem* but only a right, in certain events, to sue the State for damages. Such right is a 'mere right to sue for damages' within the meaning of proviso (e) of Section 283, and is therefore not liable to attachment and sale.

Tan Ho Cher, trading etc. v. *Yeo Poh* (1932), 1 M.L.J. 48 followed; *S.R.M.S. Palaniappa Chettiar* v. *Lim Heng Hiu* (1933), 2 M.L.J. 307 distinguished.

APPEAL to Judge from Order of Assistant Registrar.

The facts and arguments sufficiently appear from the judgment.

M. V. Pillai for Plaintiff-Appellant (*ex parte*).

MILLS, J.—The plaintiff, alleging to have an unsatisfied decree passed against the defendants, on the 3rd September, 1938, made an application to the Court under Section 253 of the Civil Procedure Code "praying for execution of the said decree by attachment and sale of the 1st defendant's property namely:—

> all the right of occupancy and interest, if any, in all those 1/3 undivided share in all those two pieces of lands, held under S.S. Nos. 77/27 and 282/23....."

On the 1st October, 1938, the Assistant Registrar refused to allow the attachment on the ground that the rights conferred by a Surat Sementara arise *ex contractu* and therefore are not attachable under Section 283 (i) of the Civil Procedure Code. Against this refusal the plaintiff appeals to the Judge. He contends that the first defendant is an approved occupant under Rule 7 of The Land Rules, 1929, and by that rule is deemed to have a permanent, transmissible and transferable right, interest and occupancy in his land "as set out in Section 35" (now Section 40) of the Land Enactment: therefore the interest of the first defendant may be attached and sold under Section 294 of the Civil Procedure Code. He also quotes the case of *S.R.M.S. Palaniappa Chettiar* v. *Lim Heng Him* (1933), 2 M.L.J. p. 307 (wrongly printed 207), in which Burton, J. ordered the sale of land held under a Surat Sementara.

But in that case the point was not in issue whether the land could be attached and sold; it was assumed that it could be, and the point in question was whether the person to whom the land had been hypothecated had the right to have the land sold free of incumbrance, and the right to have a declaration that he was entitled to rank as a preferential creditor. It is true that in the above case the Court ordered the land to be sold and presumably the State acquiesced in the transfer of the approved occupant's rights to the purchaser at the sale, but in my respectful opinion the Court was not justified in ordering the sale of the land.

On the other hand, I respectfully agree with the decision of Thorne, J. in the case of *Tan Ho Cher Trading etc.* v. *Yeo Poh* (1932), 1 M.L.J. p. 48, that a person who occupies State land in Johore under a Surat Sementara has no registrable interest in the land or indefeasible title